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Nos. 04-1244 and 04-1352

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *et al.*

Petitioners,

and

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* ABNER J. MIKVA AND WILLIAM A. NORRIS IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE SEVENTH CIRCUIT AND THE SUPREME COURT HAVE BEEN APPROPRIATELY RELUCTANT TO BE THE FIRST TO ADDRESS THE PHYSICAL VIOLENCE ISSUE 3

A. No court in this litigation has addressed whether acts or threats of physical violence could support an injunction against Petitioners 3

B. The appellate courts would benefit from the district court's initial review of the outstanding question, and may never need to address it. 5

II. ALLOWING TRIAL AND APPELLATE COURTS TO IDENTIFY AND RESOLVE REMAINING OPEN ISSUES PROMOTES EFFICIENT ADMINISTRATION OF JUSTICE. 7

A. The writ of certiorari generally establishes the questions for Supreme Court decision, and issues omitted are typically left to the trial and appellate courts. 7

B. The Court of Appeals followed established procedure in this case. 8

1. The Court of Appeals correctly identified the outstanding issue. 8

2. The Court of Appeals' remand to the district court did not violate the Supreme Court's mandate to vacate the original injunction. 9

C. The approach advanced by Petitioners would waste scarce judicial resources and obscure important issues in cases before this Court. 10

CONCLUSION 13

TABLE OF AUTHORITIES

FEDERAL CASES

Glover v. United States,
531 U.S. 198 (2001) 7, 8

In re Sanford Fork & Tool Co.,
160 U.S. 247 (1895) 7, 8

Lytle v. Household Mfg., Inc.,
494 U.S.545 (1990) 6

Matsushita Elec. Indus. Co., Ltd. v. Epstein,
516 U.S. 367 (1996) 12

National Organization for Women, Inc. v. Scheidler,
396 F.3d 807 (7th Cir. 2005) ..... *passim*

National Organization for Women, Inc. v. Scheidler,
510 U.S. 249 (1994) 3

Peralta v. Heights Medical Center, Inc.,
485 U.S. 80 (1988) 12

Quern v. Jordan,
440 U.S. 332 (1979) 7

Scheidler v. National Organization for Women, Inc.,
537 U.S. 393 (2003) 4, 8, 9

Sprague v. Ticonic National Bank,
307 U.S. 161 (1939) 7

Toyota Motor Mfg., KY., Inc. v. Williams,
534 U.S. 184 (2002) 7

Yee v. City of Escondido,
503 U.S. 519 (1992) 6, 7, 11, 12

FEDERAL STATUTES

18 U.S.C. § 1961 *et seq.* ..... *passim*

18 U.S.C. § 1951 ..... *passim*

SUPREME COURT RULES

Sup. Ct. R. 14.1(a). 7

INTEREST OF *AMICI CURIAE*[1]

Abner J. Mikva[2] is currently Schwartz Lecturer and Senior Director of the Mandel Legal Aid Clinic at the University of Chicago Law School. Having served in the federal judiciary as well as on the House Judiciary Committee while in Congress, Mr. Mikva has extensive knowledge concerning judicial procedures.

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Squarely at issue in this case is the power of courts of appeals to interpret Supreme Court mandates and remand for resolution of remaining matters. Petitioners' argument that the Supreme Court in *Scheidler II* invalidated trial court holdings that were outside the questions presented, and never even mentioned by the Court, puts this essential judicial role in jeopardy. *Amici curiae* believe that deference to traditional judicial practice and considerations of economy should lead the Court to affirm the Court of Appeals' decision to remand the case.

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[1] *Amici curiae* state that this brief has not been authored in whole or in part by counsel for a party in this case, and disclose that the law firm of Debevoise & Plimpton LLP made a contribution in kind to the printing, preparation and submission of this brief. Written consents of the parties to the filing of amicus briefs have been filed with the clerk.

[2] The current affiliations of Mr. Mikva and Mr. Norris are provided here for identification purposes only, and are not intended to convey the views of their affiliated institutions on the questions at issue.

SUMMARY OF ARGUMENT

No court in the nineteen-year history of this litigation has addressed whether acts of physical violence not premised on extortion or robbery could support an injunction under *RICO*. When Petitioners presented this Court with other questions in this case two years ago, the Court was appropriately disinclined to reach beyond those questions to address the physical violence issue. Upon remand, the Seventh Circuit Court of Appeals recognized the need to resolve this undecided question and referred it to the district court.

This Court's precedents and notions of judicial economy support allowing the Seventh Circuit's remand to the district court to follow its course. This Court has repeatedly emphasized that it prefers to rule only on the questions presented, leaving the identification and resolution of remaining issues to the courts of appeals. Petitioners' argument threatens to undermine these long-established institutional roles, wasting scarce judicial resources and confusing the issues before this Court. The Seventh Circuit's decision to remand will efficiently resolve the unaddressed question, and should be affirmed.

ARGUMENT

I. THE SEVENTH CIRCUIT AND THE SUPREME COURT HAVE BEEN APPROPRIATELY RELUCTANT TO BE THE FIRST TO ADDRESS THE PHYSICAL VIOLENCE ISSUE.

This case has the potential to place the Supreme Court in the position of analyzing facts in the first instance to determine an issue "which never before in this litigation has been the subject of full briefing or judicial consideration." *National Organization for Women, Inc. v. Scheidler*, 396 F.3d 807, 810 (7th Cir. 2005) ("*National Organization for Women*"). The Court of Appeals, relying on this Court's silence on the physical violence issue in the last venture of this case before the Court, recognized that such a task better suits the district court.

A. No court in this litigation has addressed whether acts or threats of physical violence could support an injunction against Petitioners.

In the first of this case's three ventures before the Supreme Court, the Court held that the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, contains no "economic motive" requirement, and reversed the Seventh Circuit Court of Appeals, which had affirmed the district court's dismissal of the complaint. *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994) ("*Scheidler I*"). On remand to the district court, the jury found 117 RICO predicate acts based on extortion, and four predicate acts based on acts or threats of physical violence not premised on robbery or extortion.

Following additional hearings, the trial court enjoined the Petitioners from certain behavior, including acts or threats of violence. On appeal, the Seventh Circuit held that 21 of the 117 extortion-based violations were sufficient to support the injunction. The Court of Appeals recognized but did not disturb the jury's finding that four acts or threats of physical violence served as a basis for RICO liability.

Two years ago, this case arrived before the Supreme Court for the second time. The Court invalidated the 21 predicate acts found by the Court of Appeals to sustain the jury verdict, and vacated the injunction, because the Court determined that Petitioners had not committed extortion within the meaning of the Hobbs Act. *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003) ("*Scheidler II*"). The Supreme Court further ruled that "[b]ecause petitioners did not obtain or attempt to obtain respondents' property," the remainder of the 117 extortion-based predicate acts were also "fatally flawed." *Id.* at 410. No Petitioner in that appeal challenged the jury's determination that four of the predicate acts constituting the basis for RICO liability were acts or threats of physical violence. Even after Respondents noted the four physical violence acts in their Brief in Opposition, Petitioners did not take the opportunity to ask this Court whether physical violence unconnected to robbery or extortion could support the injunction. In fact, the Petitioners did not even discuss the physical violence issue in their merits briefs. Not having been asked the question, this Court did not provide an answer.

Just as no court addressed this question before *Scheidler II*, neither has any court answered it since the Court's 2003 remand to the Seventh Circuit for further proceedings. The Seventh Circuit identified the unasked and unanswered question, and declined to

read an answer into the Court's silence on the matter. Following long-established practice that vests trial courts with responsibility to address questions prior to appellate review, the Seventh Circuit remanded for a determination whether the four physical violence acts are sufficient to support an injunction. In response to a petition for rehearing *en banc*, the Seventh Circuit observed that "the [Supreme] Court had nothing at all to say about" the topic. *National Organization for Women*, 396 F.3d at 812. "[J]udicial economy and restraint" indicated to the Seventh Circuit that it should not take up the question either, until the district court had an opportunity to speak. *Id.*

This case's current and third foray before the Supreme Court invites the Court to consider "whether a different injunction, tailored to the [four remaining] violations found, would be appropriate." *Id.* As at the time of the *Scheidler II* opinion, this question is better addressed first by a district court.

B. The appellate courts would benefit from the district court's initial review of the outstanding question, and may never need to address it.

The district court is the appropriate forum for resolution of the issue untouched by the Supreme Court for the simple reason of judicial economy. The Supreme Court has hesitated to address and resolve issues in the first instance as a means of avoiding unnecessary rulings, and the district courts have available procedures to support their role as first reviewers. The trial courts are well-positioned to make determinations of fact: they are the first courts litigants approach, they are versed in distilling multifaceted and sometimes unwieldy litigations into questions of law and fact for resolution, and they have

available established processes for expedient initial review.

Petitioners request that this Court consider whether the four physical violence acts can support the district court's injunction without the benefit of the Court's usual foundation of full litigation for considering an issue. Not only does this Court lack the support available to a district court, but also in taking on this role, the Court would deprive itself of fully briefed and developed arguments, and district and appellate court analysis and opinions. "Applying [the Supreme Court's] analysis . . . to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion." *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) (quoting *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552 n.3 (1990) (internal quotations omitted)).

Allowing the district court to rule also may extricate the Supreme Court from any cause to interpret the Hobbs Act, a statute reaching far beyond this case. The Seventh Circuit emphasized that the district court might dispose of the case on the facts:

> If and only if the district court concludes that some form of injunctive relief would be justified based on the four remaining predicate acts found by the jury, that court will have to confront a more complex legal issue, namely, whether the acts or threats of violence language in the Hobbs Act may serve as an independent predicate act under RICO.

National Organization for Women, 396 F.3d at 812.

Just as "there is no need for [the Seventh Circuit] to decide a question that may not even be pertinent to the case once the district court has looked at the points

that remain on remand," *id.*, so should the Supreme Court decline to provide the initial review.

II. ALLOWING TRIAL AND APPELLATE COURTS TO IDENTIFY AND RESOLVE REMAINING OPEN ISSUES PROMOTES EFFICIENT ADMINISTRATION OF JUSTICE.

A. The writ of certiorari generally establishes the questions for Supreme Court decision, and issues omitted are typically left to the trial and appellate courts.

Rule 14.1(a) of the Supreme Court establishes that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a). Although Rule 14.1 is prudential in nature, the Court disregards it only in the most exceptional cases, "where reasons of urgency or of economy suggest the need to address the unpresented question in the case under consideration." *Yee*, 503 U.S. at 535. Consistent with that rule, the Supreme Court identifies specific issues for review in its grant of certiorari.

In resolving an appeal, the Court typically declines to decide issues outside the questions identified for resolution in the order granting certiorari. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 202–03 (2002); *Glover v. United States*, 531 U.S. 198, 205 (2001). Rather, any issues necessary to the final resolution of the case, but outside the writ, are typically left for the circuit court, on remand, to consider and decide. *See, e.g., Quern v. Jordan*, 440 U.S. 332, 348 n.18 (1979); *Sprague v. Ticonic National Bank*, 307 U.S. 161, 168 (1939); *In re Sanford Fork & Tool Co.*,

160 U.S. 247, 256 (1895). The Court implicitly anticipates that the appellate court will take up these issues.

On remand, the circuit court must determine whether any issues outside the grant of certiorari require resolution, and propose means of bringing those issues to a close. "Whether these issues remain open, and if so whether they have merit, are questions for the Court of Appeals or the District Court to consider and determine in the first instance." *Glover*, 531 U.S. at 205.

B. The Court of Appeals followed established procedure in this case.

Following remand of *Scheidler II* from the Supreme Court, the Court of Appeals scrutinized the Supreme Court's grant of certiorari, found one outstanding issue, and concluded that, "[g]iven the Court's general refusal to decide issues outside the questions presented by a petition for a writ of certiorari . . . we will not presume that in this case it went beyond the scope of its grant of certiorari." *National Organization for Women*, 396 F.3d at 810. The Court of Appeals recognized that "[t]he district court is in the best position to decide what to do in these circumstances, given its extensive familiarity with the voluminous record in this case," *id.* at 812, and remanded to the district court for the resolution of the outstanding issue.

1. *The Court of Appeals correctly identified the outstanding issue.*

The Supreme Court granted certiorari in *Scheidler II* to answer "whether petitioners committed extortion within the meaning of the Hobbs Act" and

"whether respondents, as private litigants, may obtain injunctive relief in a civil action pursuant to . . . [RICO]." 537 U.S. at 397. Following this Court's determination that Petitioners had not committed extortion within the meaning of the Hobbs Act, none of the 117 extortion-based acts remained to support the injunction. Having disposed of all predicate acts encompassed by the grant of certiorari, the Court was not obliged to address its second question. *Id.* at 411.

The Supreme Court's opinion in *Scheidler II* made no mention of the four predicate acts not based on extortion. The grounds that the Court invoked for invalidating these extortion-based acts do not necessarily apply to the physical violence acts. The Court of Appeals declined to interpret the Court's silence as holding those four acts insufficient to support the district court's injunction. Such a conclusion on the part of the Court of Appeals would have "require[d] that we find both that the Court went beyond the scope of its grant of certiorari, and that it did so with respect to an issue not briefed by the parties and not discussed in its opinion." *National Organization for Women*, 396 F.3d at 811.

The Court of Appeals properly articulated the remaining issue in the case as whether the four outstanding predicate acts alone could support the district court's injunction and, if so, whether the Hobbs Act outlaws "physical violence" apart from extortion and robbery. *Id.*

2. *The Court of Appeals' remand to the district court did not violate the Supreme Court's mandate to vacate the original injunction.*

The Court of Appeals' identification of a remaining issue warranting trial court consideration did not violate the Supreme Court's mandate to vacate

the original injunction. The Court of Appeals fully complied with the Supreme Court mandate by instructing the district court to dissolve the nationwide injunction and consider whether *"some form* of injunctive relief would be justified based on the four remaining predicate acts found by the jury." *National Organization for Women,* 396 F.3d at 812 (emphasis added).

C. The approach advanced by Petitioners would waste scarce judicial resources and obscure important issues in cases before this Court.

Petitioners' argument that the Court of Appeals erred when it remanded the case to the trial court to consider unresolved issues strikes at the heart of well-entrenched judicial procedures. Petitioners assert that because this Court did not explicitly direct the Court of Appeals to consider the remaining four acts of physical violence, this Court implicitly included them in its disposal of the extortion-based acts. This argument gets it exactly backwards. As the Court of Appeals understood:

> [W]e will not presume that in this case [the Supreme Court] went beyond the scope of its grant of certiorari . . . to hold *sub silentio* that the four acts or threats of physical violence found by the jury cannot support the injunction.

National Organization for Women, 396 F.3d at 810-11.

Petitioners' vision of how this Court should function would yield an unmanageable appellate process. First, respondents would have to raise on appeal all arguments raised before the trial court to preserve issues for possible remand. If they did not do so, and if the Court's remand did not explicitly state

that specific issues remained open, then under Petitioners' theory further consideration of all issues would be automatically terminated.

In *Yee*, the Court recognized that forcing respondents to raise every possible alternative ground to support their position would impose an unsupportable burden:

> [T]he respondent would face the formidable task of opposing certiorari on every issue the Court might conceivably find present in the case. By forcing the petitioner to choose his questions at the outset, Rule 14.1(a) relieves the respondent of the expense of unnecessary litigation on the merits and the burden of opposing certiorari on unpresented questions.

503 U.S. at 536.

Moreover, the briefing and argument spent on alternative grounds would muddle the Court's inquiry and deflect attention from the questions presented. Decades of practice have endorsed this Court's limited method of review, and the courts of appeals' resolution of open issues, as the most efficient allocation of judicial workload. As this Court noted in *Yee*:

> Were we routinely to entertain questions not presented in the petition for certiorari, much of this efficiency would vanish, as parties who feared an inability to prevail on the question presented would be encouraged to fill their limited briefing space and argument time with discussion of issues other than the one on which certiorari was granted. Rule 14.1(a) forces the parties to focus on the questions the Court has viewed as particularly important,

> thus enabling us to make efficient use of our resources.

Id. at 536.

By encouraging proliferation of the issues raised before the Court, Petitioners' approach would turn Supreme Court review into something similar to that conducted by a trial court, and in sharp contrast to the carefully focused review the Court undertakes now. This Court has historically used its scarce resources to resolve the most important questions of law, and has found the courts of appeals fully capable of addressing remaining issues. It is for these reasons that when respondents raise alternative grounds, the Court generally refuses to consider them. *See, e.g., Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 379 n.5 (1996); *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86 (1988).

Proliferating issues would simply supply alternative bases for the Court's holdings, which then would have to be weeded out by the courts below. Although it is unfortunate that final resolution may be delayed once again, that is no reason to depart from established practice reflecting the wisdom of avoiding overly expansive appellate review.

The second unwelcome change the Petitioners' argument would induce is a drastic increase in motions for clarification to this Court. Uncertain whether the Court had implicitly disposed of trial court holdings in its rulings, parties would repeatedly return to the Court seeking clarification of which issues remained open on remand. The increase in motions for clarification would cost the Court and the litigants much unnecessary time and expense. The Court generally rules only on questions presented partly to avoid this inefficiency, and to minimize the

confusion to the parties that Petitioners' theory would provoke.

Although claiming simply to interpret this Court's mandate in *Scheidler II*, accepting Petitioners' argument would turn traditional judicial procedure on its head. This Court has made clear that ruling narrowly on questions presented, with resolution of outstanding issues left to the courts of appeals, is the most orderly and efficient distribution of judicial business. The Court of Appeals complied with this method when it properly remanded the case for the trial court to consider the four acts of physical violence.

CONCLUSION

For the foregoing reasons, Amici encourage the Court to rule in a manner that will effectuate the Court of Appeals' remand of this case to the District Court and to decline to rule on the second and third questions presented in this appeal.

Respectfully submitted,

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